

PR#9833

SMOLEN, MICHAEL

3/27/2009

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,
Plaintiff,

vs. CASE NO. 05-CV-00329-GKF SAJ

TYSON FOODS, INC., et al.,
Defendants.

DEPOSITION OF MICHAEL DAVID SMOLEN, Ph.D.
TAKEN ON BEHALF OF THE DEFENDANTS
ON MARCH 27, 2009, BEGINNING AT 9:30 A.M.
IN STILLWATER, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:

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REPORTED BY: Laura L. Robertson, CSR, RPR

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(APPEARANCES CONTINUED)

On behalf of the DEFENDANT-GEORGE'S, INC. AND GEORGE'S
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1 WHEREUPON,

2 MICHAEL DAVID SMOLEN,
3 after having been first duly sworn, deposes and says
4 in reply to the questions propounded as follows,
5 to-wit:

6 BY MR. MCDANIEL:

7 Q. Dr. Smolen, would you state your full name,
8 please, sir?

9 A. Michael David Smolen.

10 Q. Would you give us both your work and home
11 addresses?

12 A. Work address is 218 Ag Hall, Stillwater,
13 74078. Home address, 3409 South Washington Street,
14 Stillwater, 74074.

15 Q. All right. Thank you. Who is your
16 employer?

17 A. Oklahoma State University.

18 Q. What is your position?

19 A. I'm a professor of Biosystems and Ag
20 Engineering, and an extension appointment, 100 percent
21 extension.

22 Q. All right. Can you explain to us what your
23 job responsibilities are?

24 A. I serve as the water quality coordinator for
25 extension programs and division of agriculture and

1 or the Conservation Commission, and they are very
2 specific on what that includes. I don't think I could
3 give you that list exactly.

4 Q. Certainly.

5 A. But it does involve soil testing to assure
6 that the phosphorous level in pastures is not above
7 certain limits, and that the litter application,
8 fertilizer application total doesn't, or matches -- is
9 limited based on that soil test.

10 It also required buffer areas between
11 application areas and streams. I believe it addresses
12 other issues in the management of nutrients on a farm
13 as well, particularly if NRCS does it.

14 Q. And animal waste management plan is written,
15 it is a site specific plan?

16 A. It is.

17 Q. Written for a particular farmer and a
18 particular farmer's fields; is that right?

19 A. Yes.

20 Q. Generally, what is an animal waste
21 management plan designed to do?

22 A. It is designed to protect water quality.

23 Q. And in Oklahoma, these animal waste
24 management plans for registered poultry operators are
25 issued to comply with the standards developed by the

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1 USDA natural resources conservation service; right?

2 MR. NANCE: Object to the form.

3 THE WITNESS: Yes.

4 Q. (BY MR. MCDANIEL) And those standards are
5 embodied in what we commonly call the NRCS code 590?

6 A. Yes.

7 (Defendant's Exhibit 3 marked for
8 identification)

9 Q. I'm handing you what is marked as Exhibit 3.
10 Can you identify Exhibit 3, Dr. Smolen?

11 A. Yes. It is the NRCS standard for nutrient
12 management.

13 Q. It is the code 590 for Oklahoma, do you
14 agree, dated --

15 A. Yes.

16 Q. Excuse me, I spoke over you.

17 A. Yes, it is.

18 Q. Dated March 2007?

19 A. That's what it says.

20 Q. Okay. Are you generally familiar with the
21 code 590?

22 A. I'm generally familiar with it.

23 Q. As part of your duties, do you collaborate
24 with the Oklahoma NRCS on the nutrient management
25 standards in Oklahoma?

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1 percent yield; correct?

2 A. Correct.

3 Q. Okay. Now, this NRCS code 590, table 9,
4 applicable to the Illinois River Watershed still
5 allows poultry litter application, even if your soil
6 test level is at 65 or above?

7 A. It does.

8 Q. Provided you do not exceed the level of 300;
9 right? That's an absolute cap?

10 A. In the nutrient limited waters, yes.

11 Q. And my questions are all the Illinois, so I
12 don't want to be confusing.

13 A. Okay.

14 Q. So let me go back to that. Even though 65
15 STP is sufficient phosphorous for poultry grasses --
16 MS. HILL: Poultry grasses?

17 MR. MCDANIEL: Poultry grasses, I'm doing a
18 good job of clarifying this.

19 Q. (BY MR. MCDANIEL) Although 65 STP is
20 sufficient phosphorous for pasture grasses in the
21 Illinois River Watershed, the code 590 that the animal
22 waste management plans are based upon allows
23 additional poultry litter land application up to 300
24 STP?

25 A. It does.

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1 Q. Okay. Now, if you have soils that are at 65
2 STP, you agree that forage grasses can still benefit
3 from the nutrient value of the nitrogen in the litter?

4 A. True.

5 Q. Now, the code 590 has restrictions to limit
6 or eliminate litter application in vulnerable areas
7 like thin soils; correct?

8 A. Yes.

9 Q. Other vulnerable areas that are called out
10 in the code 590 would be very rocky soils, do you
11 agree?

12 A. I believe that's right.

13 Q. Soils subject to flooding?

14 A. Yes, this is in some other table, I'm sure.

15 Q. Okay. Well, conceptually, do you agree that
16 these are vulnerable areas?

17 A. Yes.

18 Q. Very rocky soils, soils subject to flooding,
19 do you agree?

20 A. Yes.

21 Q. Steep slopes?

22 A. Yes, very steep slopes.

23 Q. Close proximities to sinkholes or outcrops?

24 A. Yes.

25 Q. And close proximities to streams?

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1 in areas where a discharge can result?

2 MR. NANCE: Object to the form.

3 THE WITNESS: Yes.

4 Q. (BY MR. MCDANIEL) In your experience here
5 in Oklahoma in your field, do you have the impression
6 that poultry growers are trying to comply with their
7 animal waste management plans?

8 MR. NANCE: Object to the form. Calls for
9 speculation.

10 THE WITNESS: I suppose that's true. I have
11 no reason to believe it is not.

12 Q. (BY MR. MCDANIEL) Okay. That leads to my
13 next question. Do you have any personal knowledge
14 that there are any poultry growers in the Illinois
15 River Watershed who are not complying with the animal
16 waste management plans, nutrient management plans or
17 poultry litter management plans?

18 MR. NANCE: Object to the form.

19 THE WITNESS: I have no knowledge of any.

20 Q. (BY MR. MCDANIEL) Okay. You can set that
21 exhibit aside, sir. You would agree that poultry
22 litter has value as a fertilizer?

23 A. Yes, I do.

24 Q. You agree it also has value as a soil
25 conditioner?

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1 **A.** Yes, I do.

2 **Q.** Now, from reading your materials, I
3 understand you have had some involvement for years in
4 the area of poultry litter marketing?

5 **A.** Yes.

6 **Q.** Do you want -- give me a brief summary of
7 your work in that area.

8 **A.** The marketing work was on a 319 non-point
9 source funded project, where we set up an exchange on
10 the Internet, so that those who have litter for sale
11 could make it known to buyers. We tried to encourage
12 learning more about the product, and encouraged them
13 to list the testing -- the tested value of the litter.

14 We included a lot of fact sheets and
15 calculators and things like that to try to get it sold
16 away from the farms.

17 **Q.** What particular initiatives or programs, to
18 your knowledge, has the state of Oklahoma pursued to
19 market litter, poultry litter?

20 **A.** Well, preceding our work, the Department of
21 Agriculture had a hotline which got a lot of interest
22 at first, and then kind of faded off. We took -- we
23 expanded on the hotline and worked with them to put it
24 on the web.

25 Basically when someone called their hotline,